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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Application of New York Telephone)
Company (d/b/a Bell Atlantic-New York),)
Bell Atlantic Communications, Inc.,)
NYNEX Long Distance Company, and)
Bell Atlantic Global Networks, Inc., for)
Authorization to Provide In-Region,)
InterLATA Services in New York)

CC Docket No. 99-295

**REPLY COMMENTS OF FOCAL COMMUNICATIONS
CONCERNING BELL ATLANTIC-NY HIGH CAP FACILITIES**

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**REPLY COMMENTS OF FOCAL COMMUNICATIONS
CONCERNING BELL ATLANTIC-NY HIGH CAP FACILITIES**

Focal Communications Corporation of New York ("Focal") hereby files these Reply Comments in response to the Evaluation of the New York Public Service Commission ("NYPSC Evaluation") and the Evaluation of the United States Department of Justice ("DOJ Evaluation") filed in this Docket.

SUMMARY OF ARGUMENT

Focal is a facilities-based provider of competitive local dial tone in the State of New York. In order to provide its competitive services, Focal utilizes Bell Atlantic-New York ("BA-NY") DS-1, DS-3, and other high capacity ("high cap") services in two ways. First, it uses high cap facilities to link Focal's switches to its end-users because they typically generate traffic volumes that are too large to be handled efficiently via unbundled loops.¹ Second, Focal also uses high cap facilities to interconnect with BA-NY in order to exchange local traffic. In either case, when Focal requires high cap facilities from BA-NY, efficient and accurate compliance with the

¹ Focal prefers to acquire its high cap facilities from competitive providers such as MFN or MFS. However, because Enhanced Extended Links ("EELs") are not yet available from BA-NY, many end users and interconnection points can only be reached via BA-NY high cap facilities obtained from BA-NY's access tariffs.

orders placed with BA-NY for these services is *absolutely crucial* to Focal's ability to serve its end users. Unmentioned anywhere in the NYPSC's Evaluation (despite Focal's March 3, 1999, submission to the NYPSC) is the fact that BA-NY has been abysmal in provisioning high cap services to Focal, and this poor performance has continued to deteriorate throughout calendar 1999. Specific instances of this failure are quantified and documented in Focal's initial comments, as well as in the comments of other high capacity service users.² In addition to showing that BA-NY's high cap performance was poor, and becoming worse over time, Focal demonstrated that BA-NY's provisioning of high cap facilities is discriminatory because BA-NY deploys high cap services in response to end user requests in only three to six weeks while averaging seven weeks to fill Focal's requests for the same services.³

The DOJ's evaluation is more acute on this issue. It acknowledges the importance of BA-NY's performance in provisioning high capacity services to competitive local exchange carriers ("CLECs"), and encourages this Commission to evaluate the issue closely.⁴ Unfortunately, the DOJ also incorrectly suggests this issue was not addressed by CLECs during the state proceeding, even though it was brought to the NYPSC's attention in the Spring of 1999, and remained unaddressed in the NYPSC's evaluation.⁵

² See Joint Comments of e.spire Communications, Inc. and Net 2000 Communications Services, Inc. ("e.spire/Net 2000 Comments") at 18-20, Comments of Focal Communications Corporation of New York ("Focal Comments") at 3-4, Comments of Omnipoint Communications, Inc. ("Omnipoint Comments") at 7-10, Comments of Teligent, Inc. ("Teligent Comments") at 7-13, and Comments of Allegiance Telecom, Inc. ("Allegiance") at 10-12; Comments of Prism Communication Service, Inc. ("Prism Comments") at 20-21, and Comments of the Association for Local Telecommunications Services ("ALTS Comments") at 30-31.

³ See Focal Comments Attachment A and B.

⁴ See DOJ Evaluation at 10-11, n. 20.

⁵ Given that BA-NY has offered assurances to at least two CLECs – Teligent and NEXTLINK New York, Inc. ("NEXTLINK") – that it would cure its provisioning of high cap services, the NYPSC may have mistakenly believed there was no need to address this issue in its evaluation. Teligent Comments at 21-22; NEXTLINK Comments at 3. To the extent the NYPSC was relying upon BA-NY promises to resolve this matter, Focal respectfully submits it should have

As will be fully detailed below, and as acknowledged in the DOJ Evaluation, this current anti-competitive behavior (as well as the prospect of backsliding) is not at all deterred by the current performance plans and metrics proposed by BA-NY. First, the proposals have serious flaws that allow BA-NY to maintain far too much control over when high capacity performance measures are triggered, and thereby cover up deficiencies in its performance. Second, the associated proposed penalties are economically inadequate to control this behavior even if the defects in the associated metrics were cured. For example, in some cases BA-NY receives an incentive for poor performance; the penalties it is required to pay CLECs are lower than what it would cost to provide appropriate service. Indeed, in some situations, the penalty simply does not fit the performance failure. Thus, Focal proposes a number of corrective measures to serve as a starting point to ensure that adequate safeguards are in place *before* BA-NY is allowed to provide In-Region interLATA services.

DISCUSSION

A. There Are Major Flaws In The Performance Standards and Metrics Related to High Cap Services

In concluding that the Performance Assurance Plan's ("PAP's") "financial incentives, along with its very public enforcement process, ensure that Bell Atlantic-NY management will remain committed to Checklist compliance," the NYPSC Evaluation fails to take into account that much of the information that forms the basis for applying the PAP is completely in BA-NY's control.⁶ This alone makes the process fatally flawed. Under the currently proposed system, BA-NY is in full control of whether performance standards are triggered with regard to high capacity services. Consequently, there are many issues that do not show up in the metrics because BA-NY chooses not to report them.

insisted upon performance instead. Furthermore, even if promises could be substituted for performance, those promises should at a minimum be: (1) public; (2) measureable; and (3) subject to effective penalties for non-performance.

⁶See NYPSC Evaluation at 4.

For instance, many of the circuit orders to BA-NY are made through access service requests (“ASR”).⁷ Once the request is made, it is in BA-NY’s sole discretion to determine a firm order commitment (“FOC”) date, *i.e.*, the date when BA-NY commits to install the service. In many instances these dates are provided months after the ASR is submitted, changed without warning, and often the explanation provided is that “customer is not ready.”⁸ This allows BA-NY to change the FOC date with no accountability for missed dates.⁹ These missed dates do not show up in the performance metrics and, consequently, are not counted toward any penalty. The NYPSC Evaluation glosses over this issue and summarily dismisses the complaints of CLECs regarding this aspect of BA-NY’s performance.¹⁰ If BA-NY is allowed to delay providing FOC dates for months, and to pass off missed FOC dates as “customer not ready,” it will have unfettered rights to engage in anti-competitive behavior.

One way to resolve this problem would be to focus on the end-to-end interval rather than the issuance of a raw FOC date. As noted above, if Focal orders a circuit today, and receives a FOC date of November 5, 2000, which BA-NY ultimately meets or beats, it appears to escape

⁷See Focal Comments at 2, Teligent Comments at 8.

⁸As also indicated in the Omnipoint Comments, the “customer not ready” designation is used by BA-NY to avoid having to report missed FOC dates. *Id.* at 9.

⁹See Teligent Comments at 9, n.25, and 11.

¹⁰The NYPSC Evaluation mentions only Northpoint’s complaint about “customer not ready,” which it quickly dismisses, and it fails to address other CLEC complaints. *See* NYPSC Evaluation at 103. For instance, Focal’s complaints filed in the NYPSC proceedings were never addressed. *See* Bell Atlantic Application, Appendix C at Tab 598 (Focal complaints about missed FOC dates), Tab 604 (Nextlink complaints about missed FOC dates), Tab 608 (Teligent complaints about missed FOC dates), Tab 612 (Allegiance problems with FOCs). *See also* Section E, *infra*.

any penalty. That does not make sense. Nor is there any punishment if it generates multiple FOC dates, as it often does.

Instead of relying exclusively on FOC dates, BA-NY should be required to install circuits in thirty (30) calendar days or less from receipt of an order. Recently for Focal they have been taking fifty (50) days on average, with many closer to ninety (90) days.¹¹ By comparison, BellSouth recently claimed they deliver half of their T-1s in 8 days or less.¹² Unless CLECs specifically request due dates outside of these intervals, or are not ready to accept circuits when BA-NY is ready, BA-NY should be held to these more meaningful intervals.

Further, NYPSC places a heavy burden on CLECs when it summarily concludes that the “failure to meet ‘absolute standards’ in August [for instance] should not be read as a failure to provide non-discriminatory access under §271.”¹³ This implies that there is no correlation between the failure to meet performance standards and discriminatory conduct. Failure to meet these standards should at least create a presumption of discriminatory conduct, so that the initial burden is not placed on the CLEC to prove the conduct is discriminatory. This is simply another example of how BA-NY retains too much control over its performance and resulting penalties.

Moreover, the NYPSC seems to make excuses for every BA-NY failure; it refers to them as “non-critical,” “under development,” unreportable because of “lack of market activity,” “in striking distance of passing,” involving “low volumes of activity,” “or really not indicative of

¹¹ See Focal Comments at Attachment B. To the extent that a FOC metric has any value, it should require BA-NY to return a FOC date within seven calendar days of receipt of an order, a process which is currently taking three to four weeks on average for Focal. *Id.*

¹² Statement of BellSouth at October 27, 1999 NCF Conference, Chicago, Illinois.

¹³ See NYPSC Evaluation at 6.

discriminatory conduct.”¹⁴ So despite each of these acknowledged deficiencies, NYPSC concludes that it is “confident that Bell Atlantic-NY, once having earned §271 approval, has the proper incentive to continue to meet its commitments.”¹⁵ To the contrary, adequate performance standards and penalties must be in place *before* §271 approval to ensure that BA-NY’s conduct does not continue.

B. BA-NY Aggregates Performance In a Manner That Allows It to “Cover Up” Deficiencies

Under the current performance plan, when assessing whether BA-NY has met certain metrics, BA-NY is allowed to cover-up poor performance in one area with good performance in another area to escape penalty. As indicated in the NYPSC Evaluation, in the Mode of Entry component, for instance, BA-NY’s performance is measured on a market-wide basis, with respect to each of the modes of entry (*i.e.*, unbundled network elements, resale, facilities-based interconnection, and collocation).¹⁶ Each mode of entry is assessed through a group of “metrics,” and performance in each one the Modes of Entry is measured on an industry-wide basis.¹⁷ Further, the NYPSC Evaluation describes the assignment of penalties as follows:

Each measure in the Mode of Entry category has an assigned weight relative to its importance in keeping that Mode of Entry open to competition. Each metric is then scored as “parity met,” “parity in question” or “out of parity.”

The weighted scores are then totaled. If the threshold is exceeded, a market adjustment is automatically triggered.¹⁸

¹⁴See NYPSC Evaluation at 4 -6, including footnotes at 5.

¹⁵*Id.* at 172, Appendix.

¹⁶*Id.* at 166-167, Appendix.

¹⁷See *id.* at 167, Appendix.

¹⁸*Id.* at 169-170, Appendix.

This grouping of metrics and weighting of scores essentially allows BA-NY to use so-called “good deeds” to wipe out its “bad deeds.” This is a serious flaw in the metrics because this poor performance will remain unchecked with serious consequences to Focal and other CLECs. Penalties for these metrics need to be assessed on an individual basis.

Once these “bad deeds” are separately identified, and subject to appropriate penalties, BA-NY will have an incentive to take logical remedial action. As noted below, possibilities include the establishment of a group devoted to addressing issues associated with delayed and missed FOC high capacity dates, and more robust management escalation procedures.

C. The Current Penalties Are Inadequate to Deter Poor BA-NY Performance

Under the currently proposed structure BA-NY could actually gain more by paying penalties than by providing adequate performance. For instance, in some situations the penalties for substandard performance may be thousands of dollars, but the revenue BA-NY loses once service is installed would be much greater.¹⁹ In those situations, BA-NY is encouraged to engage in anti-competitive behavior because it is actually more profitable.

Moreover, as noted above, PAP penalties do not flow directly from poor performance. Because metrics and CLECs are grouped together, there is no direct correlation between the substandard performance and the penalties. The penalties should more directly flow from poor performance so that these issues can be isolated and addressed, and so that recidivism will not be encouraged. In addition, there does not appear to be any specific metric for percentage of on-time FOC dates associated with ASRs for high capacity services.²⁰ Correcting this problem is the first step in resolving the problem associated with the lack of “cause and effect.” Currently, the significant deficiencies in this area are going completely unchecked.

¹⁹ Focal generates about \$100 per business day (about \$70 per calendar day) in average revenue per T-1.

²⁰There is apparently a “% On Time FOC” for interconnection. *See* BA-NY Application, Appendix E, Tab 87.

Further, there is currently no mechanism for dealing with “chronic violations” once an RBOC has its section 271 application approved. In other words, penalties are not made more severe as substandard conduct becomes repetitive. The objective should be to discourage behavior, and the only means of accomplishing this is to make the penalties more severe as the same conduct is repeated. There is no such approach in the current plan.

D. There Are a Number of Corrective Measures Which Will Help Discourage BA-NY Discriminatory Behavior With Regard to High Cap Services

With regard to new installations of DS-1 and higher capacity dedicated transport circuits, we suggest the following steps be taken as a minimum:

- 1) BA-NY should provide five (5) days advance written/email notice of BA-NY missed FOC dates, or the rescheduling of FOC dates, with complete explanations of the causes of missed dates,
- 2) BA-NY should provide performance credits for missed FOC dates other than missed dates based on genuine “customer not ready,” or a 100 % credit for non-recurring installation charges for each missed FOC date,
- 3) BA-NY should obtain the agreement of a CLEC representative that a “customer not ready” justification applies *before* BA-NY unilaterally creates a “customer not ready” business record for an installation or repair, and
- 4) BA-NY should implement within three (3) months of the FCC’s Order in CC Docket No. 99-295, a detailed tracking system specifically for DS-1 and higher orders.

With respect to DS-1 and higher capacity outages, Focal suggests the following:

- 1) Where the presence of the CLEC is necessary to repair an outage, BA-NY should commit to a two (2) hour window for its technician to meet a CLEC technician on-site. Missed appointments by either party will be reciprocally compensable by the non-appearing party to the appearing party at the BA-NY tariffed or other customary hourly billing rate for its technicians,

- 2) BA-NY should be required to reciprocally compensate the CLEC for the CLEC technician's time for appearing at the site (at the usual BA technician rate), where BA-NY has demanded that the CLEC technician appear when there are no access problems or the cause of the problem is due to a BA-NY network problem, and
- 3) BA-NY should be required to obtain CLEC acceptance of DS-1 dedicated transport circuit after BA-NY provides notice that the circuit operation is properly restored.

Each of these suggestions should be viewed as a starting point for correcting the current deficiencies in the performance standards and metrics.

E. Certain Issues Which the NYPSC Evaluation Claims Were Addressed Have Not Been Addressed, and Contrary to Claims in the DOJ Evaluation CLECs Did Raise High Cap Issues Before the NYPSC 271 Proceedings

The NYPSC dismissed Northpoint's claim that BA-NY inappropriately places orders in "customer not ready" status because it concluded that Bell Atlantic had demonstrated the orders were properly placed in "customer not ready."²¹ However, the NYPSC Evaluation does not address claims that were made by other CLECs, such as Focal. In its March 3, 1999 filing before the NYPSC, Focal pointed out the extensive problems it was having with missed FOC dates, as did Allegiance, Teligent and NEXTLINK.²² This has not been addressed and was completely ignored by the NYPSC Evaluation.

The DOJ Evaluation incorrectly states that the issue of timely provisioning of "interconnection trunks" was not raised by various CLECs and, therefore, there is little record evidence of BA-NY's conduct.²³ First, the issue is not limited to interconnection trunks, but also involves provisioning of DS1 and higher circuits that are ordered to reach end users. Secondly,

²¹See NYPSC Evaluation at 103.

²²See *infra* at n.11.

²³See DOJ Evaluation at 10-11, n.20.

as indicated above, Focal, Nextlink, Teligent, and Allegiance specifically raised concerns about the FOC issues in their filings before the NYPSC.²⁴ Yet this issue has still not been adequately addressed in the performance standards or metrics. Further, other CLECs relied on BA-NY's offered assurances -- which it has not followed through on -- that it would correct these problems.²⁵ Thus the record demonstrates that CLECs have been diligently pursuing this issue.²⁶

CONCLUSION

Accordingly, as supported by the foregoing and contrary to the NYPSC Evaluation, BA-NY's performance standards and metrics are inadequate to prevent inadequate and discriminatory behavior on BA-NY's part in the provisioning of high cap services to CLECs. Further, the suggested revisions to the performance standards and penalties should be made to ensure that anti-competitive behavior is discouraged.

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Dated: November 8, 1999

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²⁴See *infra* at n.11.

²⁵See Comments of NEXTLINK indicating that it has been given assurance by BA-NY that it will correct FOC data deficiencies.

**ATTACHMENT A – EMAIL FROM ONSITE COMMUNICATIONS
TO RICK KNIGHT OF FOCAL COMMUNICATIONS**

Rick,

The success of our business is based on our ability to provide BOTH voice and data to our customers and Focal is not holding up it's end of the bargain. I can understand that periodic facilities issue into a specific building will occur, but the consistent backlogged performance that Bell Atlantic is giving to Focal is unacceptable. There can be no reasonable explanation from Bell Atlantic as to why OnSite Access is consistently getting it's T1 circuits in ahead of Focal.

I admit that Bell Atlantic's performance has been substandard even for themselves lately, but at this point the delays are hurting our business and yours. We currently have about 38 outstanding orders with Focal that necessitate a Bell Atlantic circuit be ordered. I typically expect to receive an installation date in 10 days with the actual installation occurring in 4 to 6 weeks maximum. Currently those 38 orders have been open an average of 8 weeks and 87% of them have no projected installation dates! This will delay the delivery of our service, our billing and ultimately our earnings as a company.

I've included a few recent circuits we've ordered and their performance and I can send more if you need them.

circuit ID: 32HCGL259835 ordered: 8/13 installed: 9/24
circuit ID: 32HCGL259836 ordered: 8/13 installed: 9/24
circuit ID: 32HCGL442954 ordered: 9/10 installed: 10/1
circuit ID: 32HCGL442955 ordered: 9/10 installed: 10/1
circuit ID: 32HCGL259845 ordered: 8/30 installed: 10/13

What are we going to do about this?

Lou Martinez
VP, Operations
OnSite Access

CERTIFICATE OF SERVICE

I, Bernadette T. Clark, a secretary at Swidler Berlin Shereff Friedman, LLP, hereby certify that the foregoing “Reply Comments of Focal Communications Concerning Bell Atlantic-NY High Cap Facilities” was mailed on November 8, 1999 in accordance with the attached Service List.

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